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UCC - Application of the Mississippi Uniform Commercial Code's Implied Warranty Provisions to Used Goods and the Enforceability of Disclaimer Clauses - Massey-Ferguson, Inc. v. Evans

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UCC—Application of the Mississippi Uniform Commercial Code's Implied Warranty Provisions to Used Goods and the Enforceability of Disclaimer Clauses—*Massey-Ferguson, Inc. v. Evans*, 406 So. 2d 15 (Miss. 1981).

In the early part of 1977 Bernie Evans visited the Massey-Ferguson dealer in Yazoo City to purchase some of the equipment he would need in planting 200 acres in soybeans.[1] He informed the salesman, John Warren, that he was just starting out in this business. Warren offered to help select the necessary equipment and to tell him all that he knew about farming. Relying on Warren's expertise, Evans signed purchase orders and installment contracts on the following items: a new grain drill, a used combine, a water tank and trailer and a used disc harrow.[2] Included in the purchase orders was Massey-Ferguson's regular warranty for new equipment and a clause disclaiming any warranties with regard to used equipment.[3]

During the negotiations prior to the sales, Warren assured Evans that the equipment would be delivered in time for it to be used[4] and that both the grain drill[5] and the combine[6] would be in "field ready" condition when delivered. Unfortunately, this never came true. The grain drill was delivered several weeks late in an unassembled state. Once assembled it failed to work properly and several attempts to repair it were unsuccessful.[7] Similar problems were encountered when the combine was delivered several months later. It appeared that none of the repair work which had been promised had been done, and like the grain drill, the combine was also never put in an operable condition.[8]

After the trouble began with the equipment, Evans discontinued his payments and the Massey-Ferguson Credit Corporation repossessed it.[9] Two separate actions developed from these events. The first was brought by Massey-Ferguson Credit Corporation to recover a deficiency judgment on the installment con-

1. Brief for appellee at 1, Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15 (Miss. 1981).
2. 406 So. 2d at 16, 17.
3. *Id.* at 21.
4. Brief for Appellee at 1, Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15 (Miss. 1981).
5. *Id.* at 10.
6. *Id.* 12.
7. *Id.* at 2, 3.
8. *Id.* at 4.
9. *Id.* at 5.

tracts, the second by Evans against Massey-Ferguson, Inc. under the theory of a breach of express and implied warranties.[10] These cases were consolidated, and the chancellor of Wilkinson County awarded Massey-Ferguson a deficiency judgment of $732.03 from the repossession and sale of the water tank, trailer and disc harrow. Also, Evans was awarded a judgment of $9,989.11 in his breach of warranty action.[11] On appeal, the Mississippi Supreme Court affirmed the chancellor's basic decision, but modified the amount of damages awarded. The court held that Massey-Ferguson had breached both express and implied warranties as to the new grain drill, and had also breached an implied warranty as to the used combine, despite Massey-Ferguson's contention that any implied warranty had been disclaimed and the equipment had been purchased "as is." A major part of the court's decision was based upon certain sections of the Mississippi Code Annotated (1972).[12] Almost all of the sections relied upon by the court are included in the Mississippi version of the Uniform Commercial Code.[13] The following analysis will examine the area of implied warranties, the Mississippi Supreme Court's application of those relevant sections of the U.C.C. to used products, and the apparent unenforceability of disclaimer clauses.

BACKGROUND: A LOOK AT MISSISSIPPI LAW

In 1966 the Mississippi legislature passed a bill adopting the U.C.C., to take effect March 31, 1968.[14] The bill included sections 2-314 and 2-315 of the model U.C.C. which dealt with implied warranties of merchantability and fitness for a particular purpose.[15] Section 2-316 of the U.C.C., which allows for exclusion or modification of those warranties, was omitted.[16] This omission sparked comment and criticism and led to much confusion. In an article revised for the Mississippi Law Institute, Professor William E. Hogan of Cornell University called the omission "puzzling" and urged the Mississippi Bar to work to have the provision included in the Code. He interpreted the omission as allow-

10. 406 So. 2d at 16.
11. *Id.*
12. Massey-Ferguson, Inc. v. Evans, 406 So. 2d 15 (Miss. 1981).
13. [Hereinafter referred to as U.C.C.] The Mississippi Uniform Commercial Code is codified at MISS. CODE ANN. §§ 75-1-101 through 75-10-104 (1972 and Supp. 1981).
14. 1966 MISS. LAWS ch. 316, § 10-101.
15. MISS. CODE ANN. §§ 75-2-314 and 75-2-315 (1972).
16. 1966 MISS. LAWS ch. 316 § 10-101.

ing the same type of disclaimers as before the U.C.C.[17] Another possible interpretation is that the Mississippi legislature intended to render all disclaimer clauses powerless.[18] In 1977 the legislature attempted to clarify the situation it had created by amending sections 2-314 and 2-315 of the Code. These amendments deleted language which permitted the exclusion of these warranties under section 2-316 of the Model Act.[19] The legislative intent in making these changes is clearly expressed in the Preamble to Chapter 385 of the General Laws of Mississippi, 1976, wherein it was stated and admitted that the confusion resulting from the deletion of section 2-316 has caused some courts to *permit disclaimers.* Further it is stated that "it was the intent of the Legislature by deleting section 2-316 . . . and amending section 2-314 . . . and section 2-315 . . . to prohibit the exclusion or modification of implied warranties of merchantability of fitness for a particular purpose."[20] The 1976 amendments contained another important change. MISS. CODE ANN. § 75-2-719(4) (Supp. 1981) was added to the Mississippi U.C.C. This section was not a part of the Model Act and it is significant because it disallows any limitation of remedies available for breach of the implied warranty sections.[21] It is clear that all of these sections together work to prohibit disclaimers of warranties and form the basis for the court's holding in the present case.

As stated previously, before the 1976 amendments much confusion existed concerning the state of warranty law in Mississip-

17. Hogan, *The Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Uniform Commercial Code,* 22 MISS. L. INST. 41, 48-50 (1967).

18. *See, e.g.,* Millbaugh, Coffinberger, *Seller's Disclaimers of Implied Warranties: The Legislatures Strike Back,* 13 U.C.C. L.J. 160, 164 (1980); Clark and Davis "Beefing Up Product Warranties: A New Dimension in Consumer Protection," *Warranties in the Sale of Goods* 599 (PLI Handbook Series No. 169, 1977) (Both pointing out the two possible inferences which can be drawn from the Mississippi Legislature's actions and criticizing the actions for the uncertainty and confusion they have caused).

19. The pertinent parts of these sections which were effected by these amendments read as follows: MISS. CODE ANN. § 75-2-314(1) (amended 1976) *"Unless excluded or modified,* a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." (emphasis added). MISS. CODE ANN. § 75-2-315 (amended 1976) "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is *unless excluded or modified* under section 75-2-317 an implied warranty that the goods shall be fit for such purposes" (emphasis added). The words "unless excluded or modified" were deleted by the 1976 amendments. 1976 MISS. LAWS ch. 385 § 1.

20. 1976 MISS. LAWS ch. 385.

21. *Id.* The added section reads, "Any limitation of remedies which would deprive the buyer of a remedy to which he may be entitled for breach of an implied warranty of merchantability or fitness for a particular purpose *shall be prohibited.* (emphasis added). *See, e.g.,* Montague and Montague, *Warranties Under The Mississippi Uniform Commercial Code—Rights, Remedies and Limitation of Disclaimers* 36th ANNUAL MISSISSIPPI LAW INSTITUTE 81 (1981).

pi. Some were of the opinion that by deleting section 2-316 the state was retaining a pre-U.C.C. or common law rule with regard to warranties.[22] Although this may not have been the legislature's intent, it is important to determine what the rule was before the U.C.C.

This discussion will involve two main issues. First, does an implied warranty attach to the sale of a used product, such as the combine in this case, and second, under what circumstances and conditions may the seller exclude such a warranty.

As early as 1848 the Mississippi Supreme Court recognized that, "There is certainly a tendency in the modern cases to enlarge the responsibility of the seller, and to extend the doctrine of implied warranty."[23] The court declined to follow the movement and held that *caveat emptor* was the rule to be applied in Mississippi.[24] Generally, the courts have followed this rule, showing a reluctance to recognize the existence of implied warranties and an eagerness to validate disclaimer clauses used by sellers.[25]

The advent of the automobile age in the early 1900's brought with it a multitude of cases in the area of warranty law. The first such Mississippi case, *Mobile Auto Co. v. Sturges,*[26] is not typical of those that follow since it makes no distinction as to whether the seller was the manufacturer and whether recovery was based upon an expressed or an implied warranty. In a very short and confusing opinion the court allowed the plaintiff to recover on a breach of warranty theory because of alleged defects with the

22. Hogan, *supra* note 17, at 47.

23. Otts v. Alderson, 18 Miss. (10 S. & M.) 476, 481 (1848).

24. *Id.* at 480. A suit was brought for an alleged breach of warranty of soundness with regard to a slave. The issue in the case was whether a purchase of a slave implies a warranty of soundness when the buyer paid a full price.

25. *See* Stribling Bros. v. The Girod Co., 239 Miss. 488, 124 So. 2d 289 (1963) (holding that no implied warranty existed because a salesman's representations were unauthorized; also any implied warranties were excluded by the express warranty); J. T. Fargason and Sons, Inc. v. Cullander Machinery Co., 224 Miss. 620, 80 So. 2d 757 (1955) (no implied warranty allowed where the seller was not also the manufacturer); Watts v. Adair, 211 Miss. 777, 53 So. 2d 649 (1951) (no implied warranty of fitness or quality where the seller is not the manufacturer); Voos v. Lawrence, 200 Miss. 1, 26 So. 2d 172 (1946) (no implied warranty as to a used outboard motor); Williams v. McClain, 180 Miss. 6, 176 So. 717 (1937) (no implied warranty as to a used motor vehicle); Pritchard v. Hall, 175 Miss. 588, 167 So. 629 (1936) (no implied warranty when there is a clause stating "in its present condition" in a contract for the sale of an automobile); Gerard Motor Co. v. McEachern, 150 Miss. 437, 116 So. 816 (1928) (no implied warranty when there was an opportunity to inspect); Industrial Finance Corp. v. Wheat, 142 Miss. 536, 107 So. 382 (1926) (in the sale of an automobile there is no implied warranty in the absence of fraud or where the seller is not the manufacturer unless the seller knew the buyer was relying on his judgment); P.D. Bellville Supply Co. v. Dacey, 141 Miss. 569, 106 So. 818 (1926) (same rule as case before); Joslin v. Caughlin, 26 Miss. 134 (1953) (no implied warranty of soundness for a slave). *Compare with* Mobile Auto Co. v. Sturges, 107 Miss. 848, 66 So. 205 (1914) (allowing recovery based on a breach of warranty theory but gave little justification for its decision).

26. 107 Miss. 848, 66 So. 205 (1914).

automobile.[27] In 1926 the court decided *P.D. Bellville Supply Co. v. Dacey*,[28] another automobile case which denied recovery on an implied warranty claim. The court held that there was no implied warranty where the seller was not the manufacturer and where the article was available for inspection, "in the absence of fraud on the part of the seller, unless the defects therein were latent, and the seller knew the buyer did not rely on his own judgment but on that of the seller who knew or might have known the existence of the defects."[29] Similar language was adopted in subsequent cases[30] including *Industrial Finance Corp. v. Wheat.*[31] In that case the court had an additional factor to consider because a clause contained in the contract stated, "said vehicle is accepted without any express or implied warranties unless expressly contained herein."[32] the court interpreted this to be a legitimate exclusion and held that an implied warranty did not exist.[33] A similar clause was analyzed in *Pritchard v. Hall*[34] in a suit brought by a seller to collect on a promissory note. The court construed the language, "in its present condition" to be a valid disclaimer clause and held that no implied warranty was included in the contract.[35]

One of the most cited cases in this area of Mississippi law is *Williams v. McClain.*[36] This case involved the sale of a used hearse which had been represented as a 1933 model when in fact it was a 1932 model. When McClain, the purchaser, complained, Williams, the seller, pointed at the language in the sales contract describing the vehicle as a "used Ford hearse *as is.*"[37] Williams contended that this language effectively excluded any implied warranties as to the model of the vehicle. In ruling that there is no implied warranty of a used motor vehicle the court upheld the general rule in effect at that time. The court then turned its attention to the "as is" clause. Taking into account all the writings and negotiations between the parties, the court came

27. *Id.*
28. 141 Miss. 569, 106 So. 818 (1926).
29. *Id.* at 573, 106 So. at 819 (quoting Otts v. Alderson, 18 Miss. (10 S. & M.) 476, 481 (1848).
30. *See* J. T. Fargason and Sons, Inc. v. Cullander Machinery Co., 224 Miss. 620, 80 So. 2d 757 (1955); Watts v. Adair, 211 Miss. 777, 52 So. 2d 649 (1951); General Motor Co. v. McEachern, 150 Miss. 437, 116 So. 816 (1928) (holding the evidence insufficient to establish reliance by the buyer).
31. 142 Miss. 536, 107 So. 382 (1926).
32. *Id.* at 540, 107 So. at 382.
33. *Id.* at 541, 107 So. at 382-83.
34. 175 Miss. 588, 167 So. 629 (1936).
35. *Id.*
36. 180 Miss. 6, 176 So. 717 (1937).
37. *Id.* at 10, 176 So. at 718 (emphasis added).

to the conclusion that the hearse was represented and sold as a 1933 model and the phrase "as is" meant as is represented. The court held that an express warranty as to the model had existed and therefore had been breached by the seller.[38] The rule from *Williams* with regard to the warranties applicable to used goods was strengthened and solidified in *Voos v. Lawrence.*[39] In an action to recover the purchase price paid for a used outboard motor, the court held that when the motor was secondhand there could be no recovery unless covered by an express warranty.[40]

In 1951 the Mississippi Supreme Court again acknowledged the modern trend aimed at expansion of the implied warranty doctrine. Refusing to follow the trend, the court reaffirmed its holding that where there has been an executed sale and the seller is not a manufacturer, no implied warranty exists.[41] This rule was strictly adhered to in later cases with what appeared to be inequitable results.[42] The harshness of this rule can be seen in *J. T. Fargason and Sons, Inc. v. Cullander Machinery Co.,*[43] where the court rejected an implied warranty claim. In this case the buyer had relied solely on the seller's representations and assurances in purchasing a pump to be used for irrigation purposes. After the pump was installed by the seller it failed to operate as needed and caused the loss of the plaintiff-buyer's crop. The contract provided that the seller would not be liable for any damages due to defective materials. The court denied recovery holding that there could be no implied warranty under the terms of the contract and there could be no implied warranty where the seller was not the manufacturer.[44]

In several cases the Federal courts have been asked to decide warranty questions based upon Mississippi law before the adoption of the U.C.C. Generally, these cases have held that Mississippi does recognize disclaimer clauses while at the same time placing restrictions on their enforceability.[45] In *Grey v. Hayes-*

38. *Id.* at 12-13, 176 So. at 719.

39. 200 Miss. 1, 26 So. 2d 172 (1946).

40. *Id.* The court went on to hold that, "A warranty that a secondhand article is in good condition but requires repairs to restore it to utility can mean no more than that the article can be made usable by reasonable repair." *Id.* at 5-6, 26 So. 2d at 173.

41. Watts v. Adair, 211 Miss. 777, 52 So. 2d 649 (1951).

42. Stribling Bros. Machinery Co. v. Girod Co., 239 Miss. 488, 124 So. 2d 289 (1960); J. T. Fargason and Sons, Inc. v. Cullander Machinery Co., 224 Miss. 620, 80 So. 2d 757 (1955).

43. 224 Miss. 620, 80 So. 2d 757 (1955).

44. *Id.*

45. Paul O'Leary Lumber Corp. v. Mill Equipment, Inc., 448 F.2d 536 (5th Cir. 1971); Dry Clime Lamp Corporation v. Edwards, 389 F.2d 590 (5th Cir. 1968); Grey v. Hayes-Sammons Chemical Co., 310 F.2d 291 (5th Cir. 1962).

Sammons Chemical Co.[46] the Fifth Circuit Court of Appeals cited *Stribling Bros. Machinery Co. v. The Girod Co.*[47] and *Industrial Finance Corp. v. Wheat*[48] for the proposition that disclaimer or non-warranty clauses are recognized in Mississippi. The court went further to state that, "this disclaimer must clearly and unequivocally describe the warranties it disclaims, and uncertainties in the language used must be resolved against the disclaimer."[49] The Fifth Circuit was confronted with facts similar to those in *J.T. Fargason and Sons, Inc. v. Cullander Machinery Company, Inc.*[50] and reached a different result in *Dry Clime Lamp Corporation v. Edwards.*[51] In *Dry Clime* one of the defendants, Consolidated Engineering, designed and installed a system for painting and baking plastic for Edwards. The court held Consolidated liable for breach of an implied warranty of fitness when the oven would not work, even though they were not the manufacturers, because the plaintiff had relied on their expertise in choosing a system to do the job.[52] In *Paul O'Leary Lumber Corporation v. Mill Equipment, Inc.*,[53] the Fifth Circuit affirmed a judgment against the seller of certain equipment, by holding that the disclaimer was "skeletal" and did not mention implied warranties.[54]

Since the legislature adopted the U.C.C. in 1966 there have been relatively few cases decided by the Mississippi Supreme Court on implied warranty questions. However, one leading case on the subject is *Garner v. S & S Livestock Dealers, Inc.*[55] This is an important case because the court laid out the requirements for an implied warranty of fitness under section 2-315. These are as follows:

> "(1) [T]he seller at the time of contracting had reason to know the particular purpose for which the goods are required; (2) the reliance by the

46. 310 F.2d 291 (5th Cir. 1962).

47. 239 Miss. 488, 124 So. 2d 289 (1960).

48. 142 Miss. 536, 107 So. 382 (1926).

49. *Grey* at 300. The disclaimer clause in this case read as follows: "Seller makes no warranty of any kind, express or implied, concerning the use of this product. BUYER assumes all risks for use or handling whether in accordance with directions or not." *Id.* at 301 (court's emphasis).

50. 224 Miss. 620, 80 So. 2d 757 (1955) (Held no implied warranty existed even though the buyer had relied on the seller in making the purchase).

51. 389 F.2d 590 (5th Cir. 1968).

52. *Id.* Dry Clime Corp. was the manufacturer of the oven used in the system designed by Consolidated. Both Dry Clime and Consolidated attempted to rely on the language of Dry Clime's one year guarantee. "All previous agreements, guarantees and proposals covering equipment or services for this subject are hereby nullified." This, however, did not exclude implied warranties, so the court held. *Id.* at 593.

53. 448 F.2d 536 (5th Cir. 1971) (The agreement under consideration here provided, "There are no warranties by the seller except those expressly stipulated. In no event shall the seller be liable for consequential damages.") *Id.* at 538.

54. *Id.* at 538.

55. 248 So. 2d 783 (Miss. 1971).

> plaintiff as buyer upon the skill or judgment of the seller to select suitable goods, and (3) the goods were unfit for the particular purpose."[56]

These requirements seem very similar to the reliance requirements first discussed in *P.D. Bellville Supply Co. v. Dacey*[57] and the Fifth Circuit's requirements in *Dry Clime Lamp Corp. v. Edwards.*[58] Another important case in this area is *Ford Motor Co. v. Fairley,*[59] cited by the court in *Massey-Ferguson* on the damages issue. The court held that there could be no breach of an implied warranty where a car was two years old and had been driven over 26,000 miles. The court did, however, uphold the jury's finding that the problems experienced with the car were related to those items expressly warranted by Ford in letters notifying purchasers of possible factory defects.[60]

The Federal courts have also interpreted the Mississippi version of the U.C.C. in several cases.[61] In *Van Den Broeke v. Bellanca Aircraft Corp.*[62] the Fifth Circuit decided a question involving implied warranties and the validity of disclaimer clauses. Recognizing the existing confusion in the Mississippi U.C.C. caused by the legislature's failure to enact section 2-316, the court stated, "The law with respect to limitation or exclusion of warranties in Mississippi was unclear at the time of the purchase. . . . Happily, however, we need not . . . decide whether and to what limit warranties may have been able to be disclaimed. . . ."[63]

A Look at Other Jurisdictions

Not suprisingly, these types of cases are not peculiar to the state of Mississippi. The courts of other jurisdictions have faced the issues of implied warranties for used goods and disclaimer

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56. *Id.* at 785. The plaintiff was not allowed to recover because he was not able to meet the requirements. No evidence was offered to show that he had relied on the defendant in selecting pigs he had purchased. *Id.*

57. 141 Miss. 569, 106 So. 818 (1926).

58. 389 F.2d 590 (5th Cir. 1968).

59. 398 So. 2d 216 (1981) (On the issue of damages, the court held that, "Appellant states the damages here are limited to those provided in the warranty, namely: the cost of repairs and replacement of parts . . . all as authorized by section 75-2-719. Such limitation presupposes, however, that the warrantor will fulfill his warrant. . . . Having failed . . . to make repairs and replace damaged parts when it was obligated to do so, appellant cannot limit its damages to those specifically provided in its express warranty." (citations) *Id.* at 219.

60. *Id.* at 219.

61. *See* Van Den Broeke v. Bellanca Aircraft Corp., 576 F.2d 582 (5th Cir. 1978); R. Clinton Constr. Co. v. Bryant and Reeves, Inc., 442 F. Supp. 838 (N.D. Miss. 1977).

62. 576 F.2d 582 (5th Cir. 1978). The court held that the disclaimers were ineffective because they had not been under part of the contract.

63. *Id.* at 584.

clauses with sometimes very contradictory results. Florida went through periods of confusion before settling on a rule with regard to implied warranties and used goods. In 1931 the Florida Supreme Court decided *McDonald v. Sanders,*[64] a case involving the sale of a used steam shovel. The court stated as the general rule that there is no implied warranty as to the quality or fitness of a used article. The court did, however, find for the purchaser on an express warranty theory because the seller had assured him that the steam shovel would be in "good working condition."[65] Because the case was actually decided on the express warranty theory, the language addressing implied warranties may be considered dicta and not binding for the rule that no implied warranty is involved in the sale of secondhand goods. In *Enix v. Diamond T. Sales and Service Co.*[66] the court held that implied warranties apply regardless of whether the goods were new or used. Although the Florida U.C.C. was not yet in force, the court mentioned that the implied warranty sections of the code make no distinction between new and used goods.[67] In *Keating v. DeArment*[68] the court seemingly changed its position, this time going back to the general rule that there is no implied warranty of fitness or quality with used goods espoused in *McDonald v. Sanders.*[69] This issue was finally put to rest in *Brown v. Hall*[70] where the court expressly overruled any language in *Keating* contrary to the rule in *Enix. Brown v. Hall* has been relied on in cases interpreting the U.C.C. and is cited for the proposition that implied warranties can apply to the sale of used goods.[71] Based upon these cases, it is now a well-settled rule in Florida that implied warranties apply to the sales of used goods.[72]

In Alabama the courts have examined this problem and reached a different conclusion. In *Hodge v. Tufts*[73] the court upheld the trial court's charge to the jury that the only implied warranty that applied to a used soda fountain was that "such article or thing

64. 103 Fla. 93, 137 So. 122 (1931).

65. *Id.* at _____, 137 So. at 125.

66. 188 So. 2d 48 (Fla. Dist. Ct. App. 1966).

67. *Id.* at 52.

68. 193 So. 2d 694, 697 (Fla. Dist. Ct. App. 1967) (Liles, J., concurring). In his concurrence Justice Liles could not agree with the general rule regarding used goods in light of *Enix v. Diamond T. Sales and Service Co.*

69. 103 Fla. 93, 137 So. 122 (1931).

70. 221 So. 2d 454 (Fla. Dist. Ct. App. 1969).

71. Fuquay v. Revels Motors, Inc. 389 So. 2d 1238 (Fla. Dist. Ct. App. 1980); Knipp v. Weinbaum, 351 So. 2d 1081 (Fla. Dist. Ct. App. 1977); Overland Bond and Investment Corp. v. Howard, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972).

72. Bert Smith Oldsmobile, Inc. v. Franklin, 400 So. 2d 1235 (Fla. Dist. Ct. App. 1981).

73. 115 Ala. 366, 22 So. 422 (1895).

be reasonably suitable for the purpose for which it was intended to be used."[74] The Alabama court in *Kennebrew v. Southern Automatic Electric Shock Machin. Co.*[75] stated a similar rule, however, that case involved new products sold by the manufacturer. In 1914, in a case involving the sale of used sawmill equipment, it was held that because the equipment was used it carried no implied warranty.[76] This was also the rule followed by the court in *Kilborn v. Henderson.*[77] In *Trax, Inc. v. Tidmore,*[78] the court could find no Alabama case in which the implied warranties of the U.C.C. had been extended to used motor vehicles. It was also held that the general rule from *Kilborn* that implied warranties do not apply to used vehicles was controlling under the U.C.C. The court limited its holding to the facts of that case, refusing to lay down a hard and fast rule regarding used goods or vehicles and implied warranties.[79]

The rule followed in Alabama is not the majority rule.[80] In *most* jurisdictions interpreting the U.C.C., implied warranties *do apply or may apply* to sales of used goods. Many of these cases have been decided on language included in the official comments to the U.C.C.[81] Note 3 of the official comments to section 2-314 contains the following statement, "A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description."[82] This statement has been used by the courts to justify extending the implied warranty sections to the sale of used goods.[83] Other courts have supported this rule without referring to the comments, instead basing their decision on pre-U.C.C. case law from within their jurisdiction or cases from other jurisdictions supporting this rule.[84]

74. *Id.* at 370, 22 So. at 423.

75. 106 Ala. 377, 17 So. 545 (1895).

76. Johnson v. Carden, 187 Ala. 142, 65 So. 813 (1914).

77. 37 Ala. App. 173, 65 So. 2d 533 (1953).

78. 331 So. 2d 275 (Ala. 1976) *appeal after remand,* 349 So. 2d 597 (Ala. 1977).

79. 331 So. 2d 275 at 277 (Ala. 1976).

80. Note, *Sales: Extension of Implied Warranty of Merchantability to Used Goods,* 46 Mo. L. REV. 249, 250 (1981). This article contains an excellent discussion of how the rule is applied differently in the various states.

81. *Id.* at 250. Some jurisdictions hold that implied warranties do apply, others hold that they may apply.

82. U.C.C. § 2-314, comment 3 (1981).

83. Overland Bond and Investment Corp. v. Howard, 9 Ill. App. 3d 348, 292 N.E.2d 168 (1972). (The seller of a used car to a traveling salesman was held liable under section 2-314, implied warranty of merchantability, and section 2-315 implied warranty of fitness); Rose v. Epley Motor Sales, 288 N.C. 53, 215 S.E.2d 573 (1975); Natale v. Martin Volkswagen, Inc., 92 Misc. 2d 1046, 402 N.Y.S. 2d 156 (1978).

84. *See* O'Neil v. International Harvester Co., 40 Colo. App. 369, 575 P.2d 862 (1978); Bert Smith Oldsmobile, Inc. v. Franklin, 900 So. 2d 1235 (Fla. Dist. Ct. App. 1981); Centennial Insurance Co. v. Vic Tanny International, Inc., 46 Ohio App. 2d, 15 (Miss. 1981).

ANALYSIS

In *Massey-Ferguson, Inc. v. Evans*[85] the Mississippi Supreme Court dealt with the two issues discussed in the previous sections. The first issue centered around the court's holding that Massey-Ferguson had breached both its implied warranty of merchantability and implied warranty of fitness with regard to the used combine.[86] The court very easily showed the requirements necessary to establish a breach of those warranties, but failed to consider an essential prerequisite factor. The court never made the determination that these warranties actually applied to the sale of the used combine or any other secondhand article. As mentioned previously, the courts of several other jurisdictions have relied upon the official comments to the U.C.C. for support on this issue. This means of justification is not available to our court because the official comments were not adopted with the rest of the U.C.C. by the Mississippi legislature. The other courts which have applied this rule based their decisions on case law. The court here cited no authority as support for this proposition from either outside or inside the state. Had the case law of this state been examined, the examination would have revealed cases such as *Williams v. McClain*[87] and *Voos v. Lawrence.*[88] In each the court held that there was no implied warranty applicable to the sale of used goods. The only support which can be found for this lack of a ruling on the issue by the court is discovered in the annotations following sections 75-2-314 and -315 of the Mississippi Code Annotated. Without any futher guidance from the court, it must be assumed that at least a part of the decision is based upon cases included in these annotations, or that the court incorporated the annotations into its references to the sections which they follow.

The other issue had already been settled for the court, and all that remained was to follow the law as drafted by the legislature. This, of course, refers to the validity of the "as is" disclaimer clause included in the sales contract. Following the 1976 amendments contained in Chapter 385 of the General Laws of Mississippi, it is clear that disclaimer clauses are prohibited where they attempt to interfere with remedies available for breach of an implied warranty. The omission of section 2-316 and the addition of Miss.

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85. 406 So. 2d 15 (Miss. 1981).

86. For a discussion of these different types of warranties see J. WHITE AND R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, 343-60 (2d ed. 1980).

87. 180 Miss. 6, 176 So. 717 (1937).

88. 200 Miss. 1, 26 So. 2d 172 (1946).

CODE ANN. §§75-2-719(4)[89] and 11-7-18[90] (Supp. 1981) compels the decision reached by the court.

The next logical step is to examine the wisdom in an inflexible rule which will not permit disclaimers in any circumstances. If the purpose of the legislation is to protect the consumer, why not limit it to those situations where a consumer is involved? Is there any reason not to permit the use of disclaimers between businessmen or merchants? These people are presumed to be knowledgeable and competent; therefore, the need for protection does not exist. Some states are even passing legislation which protects certain classes of consumers, or covers certain types of purchases. In a North Dakota case where a man purchased a used tractor which would not work, he was protected by such a statute.[91] Section 51-07-07 of the North Dakota Century Code provided:

> Any person purchasing any gas or oil burning tractor, gas or steam engine, harvesting or threshing machinery, for his own use shall have a reasonable time after delivery for the inspection and testing of the same, and if it does not prove to be reasonably fit for the purpose which it was purchased, the purchaser may rescind the sale. . . . Any provision in any written order or contract of sale or other contract, which is contrary to any provisions of this section, hereby is declared to be against public policy and void.[92]

North Dakota also allowed disclaimer or exclusion of warranty clauses but that section did not "impair or repeal any statute regulating sales to *consumers, farmers* or other *specified classes of buyers.*"[93] By doing this, disclaimer clauses are not prohibited in all situations, but only where the legislature feels protection is needed.

CONCLUSION

The Mississippi Supreme Court has taken a much needed step toward clearing away the clouds of confusion which have surrounded the Mississippi Uniform Commercial Code since its adoption. With regard to the used goods-implied warranty issue, the correct decision was probably made, but as to the disclaimer clause issue the court made the only decision the law would allow. The laws are now drafted and interpreted in such a way as to make Mississippi one of the more liberal states in the area of consumer

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89. 1976 MISS. LAWS ch. 385.

90. MISS. CODE ANN. § 11-7-18 (Supp. 1981) reads: "There shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose."

91. Hoffman Motors, Inc. v. Enockson, 240 N.W.2d 353 (N.D. 1976).

92. *Id.* at 354.

93. *Id.* at 355 (emphasis added). (quoting N. D. CENT. CODE § 41-02-02).

protections.[94] If in the future it becomes apparent that imposing this standard on merchants is detrimental to the growth of business and commerce, then it will be up to the legislature to make the necessary changes. It is very important that any changes in this area be clearly and unambiguously drafted to avoid the lack of clarity which has just been eliminated.

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94. In the case of Royal Lincoln-Mercury Sales v. Wallace, 415 So. 2d 1024 (Miss. 1982), the court held, citing *Massey-Ferguson*, that a purchaser of an automobile was not entitled to the warranty protection of MISS. CODE ANN. § 72-2-315, fitness for a particular purpose. The court stated that the purchaser was buying the car for transportation, not for any special purpose, therefore, the seller's judgment was not needed in working the selection. However, the court did not hold that in the case of an automobile purchase there was a warranty that the product would be fit for the ordinary purpose for which it was purchased under MISS. CODE ANN. § 85-2-314, citing the *Massey-Ferguson* case as support.